

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel.)
W. A. DREW EDMONDSON, in his capacity as)
ATTORNEY GENERAL OF THE STATE OF)
OKLAHOMA and OKLAHOMA SECRETARY)
OF THE ENVIRONMENT C. MILES TOLBERT,)
in his capacity as the TRUSTEE FOR NATURAL)
RESOURCES FOR THE STATE OF OKLAHOMA,)

Plaintiff,)

vs.)

05-CV-0329 TCK-SAJ

TYSON FOODS, INC., TYSON POULTRY, INC.,)
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)
AVIAGEN, INC., CAL-MAINE FOODS, INC.,)
CAL-MAINE FARMS, INC., CARGILL, INC.,)
CARGILL TURKEY PRODUCTION, LLC,)
GEORGE'S, INC., GEORGE'S FARMS, INC.,)
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)
and WILLOW BROOK FOODS, INC.,)

Defendants.)

TYSON FOODS, INC., TYSON POULTRY, INC.,)
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)
GEORGE'S, INC., GEORGE'S FARMS, INC.,)
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)
and WILLOW BROOK FOODS, INC.,)

Third Party Plaintiffs,)

vs.)

City of Tahlequah, et al.,)

Third Party Defendants)

**DEFENDANTS/THIRD PARTY PLAINTIFFS' OPPOSED MOTION
FOR LEAVE TO FILE AMENDED THIRD PARTY COMPLAINT**

Defendants/Third Party Plaintiffs, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson
Chicken, Inc., Cobb-Vantress, Inc., George's, Inc., George's Farms, Inc., Peterson Farms,

Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc., (“Third Party Plaintiffs”) hereby move for leave to file their proposed Amended Third Party Complaint (attached hereto as Ex. “A”), pursuant to Fed. R. Civ. P. 15(a). Counsel for Plaintiffs has been contacted and opposes the granting of the relief requested.

The Amended Third Party Complaint is necessary in order to allow the Third Party Defendants to accomplish the following:

- Join a limited number of additional potentially responsible parties, who are sovereign governmental entities, and who could not be joined in the original Third Party Complaint due to notice prerequisites of the Oklahoma Governmental Tort Claims Act, Okla. Stat. tit 51, § 151, *et seq.* (the “GTCA”);
- Join a limited number of additional potentially responsible parties who have been discovered since the filing of the original Amended Complaint, and who could not be joined until the notice prerequisites of the Citizen Suit Provisions of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (“RCRA”), had been satisfied;
- Amend the claims asserted against a limited number of potentially responsible parties who were named in the original Third Party Complaint in order to assert a claim under RCRA, which could not previously be asserted until the notice prerequisites of the aforementioned statute had been satisfied;
- Amend the allegations against a limited number of Third Party Defendants who were named in the original Third Party Complaint in order to address newly discovered information regarding the Third Party Defendants’ properties and/or operations;
- Dismiss a limited number of Third Party Defendants named in the original Third Party Complaint who cannot be served, or who were incorrectly identified; and
- Amend the allegations to eliminate the cause of action for indemnity and to clarify the bases for other previously asserted causes of action.

PROCEDURAL HISTORY

1. On approximately March 9, 2005, Plaintiffs served the Third Party Plaintiffs with a purported Notice of Intent to Sue under the Citizen Suit provisions of RCRA (the “Notice”). The facially-deficient Notice (*see* Dkt. No. 64) contended that, among other things, the Third Party Plaintiffs had “contributed and are continuing to contribute to the handling, storage and/or disposal of solid and/or hazardous waste in a manner that may and does present an imminent and substantial endangerment to human health and the environment in the Illinois River Watershed located in northeastern Oklahoma and northwestern Arkansas (hereinafter the ‘IRW’).”

2. Approximately thirty days later, the Third Party Plaintiffs served their own Notices of Intent to Sue under RCRA upon a number of potentially responsible parties that had been identified as owning and/or operating lands, facilities or businesses within the IRW that had the potential to release some or all of the same constituents identified in the Plaintiffs’ Notice as the basis for their claim.

3. On June 13, 2005, Plaintiffs filed their original Complaint in this matter alleging that Third Party Plaintiffs caused injury to the IRW,¹ including the biota, lands, water and sediments therein as a consequence of the practice of land applying poultry litter from poultry growing operations owned by independent farmers who contract with Third Party Plaintiffs to raise poultry. Plaintiffs alleged nine counts against the Third Party Plaintiffs, including claims for cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9607(a); natural resource damages under CERCLA, 42 U.S.C. § 9607(f); public and

1 Complaint at ¶ 22.

private nuisance and nuisance *per se* under Oklahoma law and federal common-law; trespass under Oklahoma law; violations of Oklahoma statutes and regulations, namely OKLA. STAT. tit. 27A, § 2-6-105, OKLA. STAT. tit. 2, § 2-18.1, OKLA. STAT. tit. 2, § 10-9.7, OAC §35:17-5-5, and OAC § 35:17-3-14; and unjust enrichment, restitution and disgorgement under Oklahoma law. Plaintiffs alleged they are entitled to recover past and future damages, restitution, environmental assessment, remediation, punitive damages, temporary and permanent injunctive relief, attorney's fees and costs.

4. On July 29, 2005, Third Party Plaintiffs served written notice setting forth their potential third-party claims predicated on the Plaintiffs' original Complaint upon Adair County, Oklahoma, Cherokee County, Oklahoma, Delaware County, Oklahoma and Sequoyah County, Oklahoma pursuant to the GTCA, OKLA. STAT. tit. 51, § 157.¹

5. On August 18, 2005, Plaintiffs filed their First Amended Complaint (Dkt. No. 18-1), which for the first time included a count based upon RCRA.

6. On September 9, 2005, Judge Ellison entered an Order upon the unopposed Motion of the Third Party Plaintiffs allowing the Third Party Plaintiffs until October 3, 2005, to answer or otherwise plead in response to the First Amended Complaint. (Dkt. No. 43.)

7. On October 4, 2005, the Third Party Plaintiffs filed their Third Party Complaint setting forth their claims against approximately 160 sets of Third Party Defendants based upon the Third Party Defendants' prior and existing operations and/or

¹ OKLA. STAT. tit. 51, § 156 requires that any party having a claim against a county or municipality must present a claim to that county or municipality before bringing suit. OKLA. STAT. tit. 51, § 157 states that if a county or municipality fails to approve the claim within ninety (90) days, the claim is deemed denied. After denial, the party must file suit against the county or municipality within one hundred eighty (180) days.

activities within the IRW, which were more specifically identified in Paragraphs 19 through 170 of the Third Party Complaint.

Those operations and activities include, but are not limited to, discharging of sewage and wastewater, land applying organic and commercial fertilizer and chemicals, failing to properly maintain and prevent erosion of riparian lands, mining of gravel and dirt within the river and creek beds, maintaining livestock operations, and permitting livestock access to the waters and riparian zones within the IRW. The Third Party Complaint further alleges that the Third Party Defendants' activities have resulted in the release into the IRW of some or all of the constituents alleged by Plaintiffs in the First Amended Complaint.

Although Third Party Plaintiffs have denied and continue to deny all of the allegations of wrongdoing as alleged by Plaintiffs in the First Amended Complaint, they allege that should they be adjudged liable for damages or injunctive relief pursuant to any of Plaintiffs' claims for cost recovery and natural resource damages under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607 ("CERCLA"), nuisance, nuisance *per se*, or trespass, that they would be entitled to contribution from the Third Party Plaintiffs pursuant to 42 U.S.C. § 9613(f) or OKLA. STAT. tit. 12, § 832 based upon the Third Party Defendants' operations and/or activities within the IRW. Additionally, Third Party Plaintiffs set forth their claims against the Third Party Defendants for unjust enrichment predicated on any award of damages or injunctive relief in favor of Plaintiffs and against Third Party Plaintiffs for any harm caused by the operations of the Third Party Defendants. Third Party Plaintiffs also set

forth their own cause of action against the Third Party Defendants pursuant to the Citizen Suit provisions of RCRA.

8. On October 11, 2005, and October 17, 2005, Third Party Plaintiffs served Adair County, Oklahoma, Cherokee County, Oklahoma, Delaware County, Oklahoma, Sequoyah County, Oklahoma, Tahlequah Public Works Authority and Westville Utility Authority with supplemental written notices of Third Party Plaintiffs' claims based upon the First Amended Complaint pursuant to the GTCA accompanied by a Notice of Intent to Sue pursuant to RCRA.² These parties could not be joined as Third Party Defendants and/or claims pursuant to RCRA could not be asserted until the 90-day waiting periods from the date of service had elapsed, or until January 9, 2006 and January 16, 2006, respectively.

9. On November 10, 2005, Third Party Plaintiffs served River Farms of Tahlequah, LLC; Kevin W. Tye; Katherine L. Tye; Twin City Construction, Inc.; David R. and Robin L. Wofford; Wauhilla Outing Club; Anthony Wayne Hare; LaDonna Eddings Caviness; Thomas E. Eddings; Bonnie Eddings Kile; Sue Eddings Shankle; Darrell Moss; William J. and Cherrie House; Darryl Cates; Tony and Laura Hamm; Daryleen Hamm; the John E. and Virginia W. Adair Family Revocable Trust; Eugene Dill, individually and d/b/a as Cookson Country Store and Cabins; Doris Mares, individually and d/b/a as Cookson Country Store and Cabins; Lake Country Resort, d/b/a Tenkiller Golf Club; Ancil Maggard; Jesse T. Proctor; Brazil Creek Minerals, Inc.; Lena

² 42 U.S.C. § 6972 (a)(2)(A) requires that any party seeking to assert a claim under the Citizen Suit provisions of RCRA must give notice of the alleged endangerment to, among others, the person alleged to have contributed to or be contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste at least ninety days prior to commencing action under 42 U.S.C. § 6972 (a)(1)(B).

and Garner Garrison; Julie and John Cotherman; Helen Watts, Trustee of Helen Watts Revocable Trust; Hoby Ferrell, Greater Tulsa Investments, LLC with Notices of Intent to Sue under RCRA. These parties could not be joined as Third Party Defendants and/or claims pursuant to RCRA could not be asserted until the 90-day waiting periods from the date of service had elapsed, or until February 8, 2006.

10. Third Party Plaintiffs state they have contacted the Plaintiffs in this matter who have stated that they object to the filing of this motion.

PROPOSED AMENDMENTS

Third Party Plaintiffs hereby submit their proposed Amended Third Party Complaint, which incorporates the following revisions:

11. Addition of the following governmental entities, which Third Party Plaintiffs were legally precluded from including in their original Third Party Complaint pursuant to the statutory 90-day waiting periods set forth in the Oklahoma GTCA and RCRA: Adair County, Oklahoma; Cherokee County, Oklahoma; Delaware County, Oklahoma; Sequoyah County, Oklahoma; Tahlequah Public Works Authority; and Westville Utility Authority.

12. Substitution of the following private persons and entities, which Third Party Plaintiffs were legally precluded from including in their original Third Party Complaint pursuant to the statutory 90-day waiting period set forth in RCRA: John E. and Virginia W. Adair as trustees of the John E. and Virginia W. Adair Family Revocable Trust.

13. Addition of a claim pursuant to RCRA against the following Third Party Defendants, which Third Party Plaintiffs were legally precluded from including in their

original Third Party Complaint pursuant to the statutory 90-day waiting period set forth in RCRA: River Farms of Tahlequah, LLC; Kevin W. Tye and Katherine L. Tye; Twin City Construction, Inc.; David R. and Robin L. Wofford; Wauhilla Outing Club; Anthony Wayne Hare; LaDonna Eddings Caviness; Thomas E. Eddings; Bonnie Eddings Shankle; Darrell Moss; William J. and Cherrie House; Darryl Cates; Tony and Laura Hamm; Daryleen Hamm; the John E. and Virginia W. Adair Family Revocable Trust; Eugene Dill, individually and d/b/a as Cookson Country Store and Cabins; Doris Maries, individually and d/b/a as Cookson Country Store and Cabins; Lake Country Resort, d/b/a Tenkiller Golf Club; Ancil Maggard; Jesse T. Proctor; Brazil Creek Minerals, Inc.; Lena and Garner Garrison; Julie and John Cotherman; Helen Watts; Trustee of Helen Watts Revocable Trust; Hoby Ferrell, and Greater Tulsa Investments, LLC.

14. Dismissal of all claims against the following Third Party Defendants: Ronald Allen, Colleen Brown, Stephen R. Hamrick, Mildred Ryals Woodward, Pro Lawn Services, Inc.; Stephen R. Hamrick, Brian Hamrick, Bryan Sand and Gravel; William D. Langley; Eurma White; Carl Merseburgh; Gail Wilton; David and Bobbie Stratton; and T& M Sand and Gravel.

15. Addition of Sequoyah Fuels Corporation, which upon information and belief is the subsidiary of Third Party Defendant, Sequoyah Fuels International, and the permit holder of record for NPDES Permit No. OK0000191, which discharges into the IRW.

16. Addition of Pro Lawn and Landscape (erroneously identified in the original Third Party Complaint as “Pro Lawn Services, Inc.”) including the owners and/or operators of said entity as John or Jane Does No. 11 through 15. Pro Lawn and

Landscape provides lawn care services, which include but are not limited to the application of fertilizers, herbicides and other chemicals to lands within the IRW. On November 10, 2005, Third Party Plaintiffs served Pro Lawn and Landscape with a Notice of Intent to Sue under RCRA, and it therefore could not be joined until February 8, 2006.

17. Addition of Dairl G. and Dorothy Clonts, individually and d/b/a Baron Fork Creek Camp. Eurma White was previously identified in the Original Third Party Complaint as being the current owner and operator of Baron Fork Creek Camp. Upon further investigation, Third Party Plaintiffs became aware of the fact that Eurma White was the former owner of Baron Fork Creek Camp and Dairl G. and Dorothy J. Clonts are now the current owners and operators of Baron Fork Creek Camp.

18. Substitution of John E. and Virginia W. Adair as trustees of the John E. and Virginia W. Adair Family Trust for the previously identified unknown trustees of the John E. and Virginia W. Adair Family Trust. Since the filing of the Third Party Complaint, Third Party Defendants became aware that John E. and Virginia W. Adair were the trustees of the John E. and Virginia W. Adair Family Trust and through their amendment seek to properly identify them in that capacity.

19. Substitution of John W. Stacy for the previously identified John and/or Jane Does No. 6 through 10 as owner/operator of Big John's Exterminating. Since the filing of the Third Party Complaint, Third Party Defendants became aware that John W. Stacy was the actual owner and operator of Big John's Exterminating and through their amendments seek to properly identify him in that capacity.

20. Correctly identify Third Party Defendants, Brian R. Jenni and Barbara A. Hamrick, individually and d/b/a Hanging Rock Camp. In the original Third Party

Complaint, these individuals were erroneously identified as Jenni and Brian R. Hamrick, individually and d/b/a Hanging Rock Camp and Store.

21. Additional revisions to certain allegations and statements of claims to correct scrivener's errors, to reflect newly-discovered information, to eliminate the cause of action for indemnity, and to clarify the bases for the Third Party Plaintiffs' theories of recovery.

ARGUMENT AND AUTHORITY

In general, the federal courts look favourably on requests to amend the Complaint, particularly where, as here, it is early in the proceedings, and the amendment will serve the complete adjudication of the controversy. Fed. R. Civ. P. 15 (a) states that leave to amend should "be freely given which justice so requires." In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Supreme Court held that in the absence of undue delay, bad faith or dilatory motive on the part of the movant, and if the "underlying facts or circumstances. . . may be the subject of relief," the trial court should give plaintiff an opportunity test his claim.

It is beyond doubt that the Third Party Plaintiffs' request to amend their Third Party Complaint is not motivated by any malevolent or dilatory objective. The proposed revisions to the Third Party Complaint are entirely consistent with the Third Party Plaintiffs' efforts to date in this lawsuit to pursue and preserve their rights against other potentially responsible parties as authorized by Fed. R. Civ. P. 14(a). Given that these proceedings are still at an early stage, the addition of a limited number of potentially responsible parties and the refinement of claims against others will have little effect on the progress of the case, and it will inflict no prejudice on any current party to the

lawsuit. Further, the Third Party Plaintiffs' Motion for Leave to Amend has not been unduly delayed, as the Third Party Plaintiffs have been diligently pursuing the identification of significant potentially responsible parties, and have brought their Motion within a reasonable time period after the statutory notice periods dictated by the Oklahoma GTCA and RCRA were satisfied.

A. Potentially Responsible Parties Identified After July 6, 2005 Could not be Joined or Sued Under RCRA in the October 4, 2005 Third Party Complaint Due to the 90-Day Statutory Notice Period of the GTCA and RCRA.

Third Party Plaintiffs' ability to assert their third party claims as quickly as they may have liked has been impaired by the procedural requirements of notice and the 90-day waiting periods set forth in Oklahoma's GTCA and the Citizen Suit provision of RCRA. This circumstance was further complicated by Plaintiffs twice reversing their position on asserting a claim under RCRA. In March 2005, Plaintiffs purportedly served the Third Party Plaintiffs with a Notice of Intent to Sue pursuant to RCRA. Based upon that initial Notice, Third Party Plaintiffs commenced the process of locating and identifying potentially responsible parties, and in April 2005 served their own Notices of Intent to Sue pursuant to RCRA on the potentially responsible parties identified to date giving notice that such parties would be joined as third-parties in the event the Plaintiffs proceeded with filing their lawsuit. Since that initial Notice, Third Party Plaintiffs have continued to identify other potentially responsible parties. Notably, in June 2005 when Plaintiffs filed their original Complaint, they did not assert a claim under RCRA, which relieved the Third Party Plaintiffs of the obligation to give notice to any subsequently-identified potentially responsible parties pursuant to 42 U.S.C. § 6972(a)(1)(B).

Plaintiffs presented the Third Party Defendants with yet another reversal when they filed their First Amended Complaint on August 19, 2005, which included a RCRA claim. Once again, the Third Party Plaintiffs were burdened with issuing Notices of Intent to Sue under RCRA to potentially responsible parties who should be joined into the lawsuit.

By Order dated September 9, 2005, Judge Ellison granted the Third Party Plaintiffs until October 3, 2005, to answer or otherwise plead in response to Plaintiffs' First Amended Complaint. (Dkt. No. 43.) Accordingly, pursuant to Fed. R. Civ. P. 14(a), the Third Party Plaintiffs were allowed until October 13, 2005, to file their Third Party Complaint without the necessity of obtaining leave of the Court. Because of Plaintiffs' off again and on again RCRA claim, when the date arrived for filing of the Third Party Complaint, the Third Party Plaintiffs had identified a number of Third Party Defendants for which the statutory notice and waiting periods under the GTCA and RCRA had been satisfied, but they had also identified a number of potentially responsible parties for which the statutory prerequisites to filing suit had not be satisfied.

For example, after reviewing the allegations of the original Complaint (which did not include a RCRA claim) the Third Party Plaintiffs sent GTCA notices to Adair, Cherokee, Delaware and Sequoyah Counties (the "Counties") of the Third Party Plaintiffs' potential claims against them for their activities within the IRW. Approximately twenty days after Third Party Plaintiffs issued their notice under OKLA. STAT. tit. 51 § 156 to the Counties, Plaintiffs filed their First Amended Complaint asserting their RCRA claim. Plaintiffs' amendment to their Complaint compelled the

Third Party Plaintiffs to serve amended GTCA notices on these governmental entities to include Notices of Intent to Sue under RCRA.³

The Third Party Plaintiffs were similarly impeded in their ability to join private potentially responsible parties in their original Third Party Complaint and were prevented from stating claims under RCRA against a number of these Third Party Defendants for which RCRA notice period had not been satisfied. Subsequent to the filing of the original Third Party Complaint, the Third Party Plaintiffs have identified other significant potentially responsible parties, both governmental and private, for which GTCA notices (as applicable) and RCRA Notices of Intent to Sue and the respective prescribed 90-day waiting periods were prerequisites to their joinder into the lawsuit. Given these procedural hurdles, as well as the timing complications caused by Plaintiffs' indecision as to whether or not to assert a claim under RCRA, the Third Party Defendants maintain that the timing of their instant Motion is reasonable and without undue delay.

B. The Proposed Amended Third Party Complaint Serves Justice and Will Aid in the Administration of the Case.

In addition to the proposed changes and additions identified above, the proposed First Amended Third Party Complaint seeks to clarify Third Party Plaintiffs' claims and to properly identify certain Third Party Defendants. Ultimately, each of these revisions and additions proposed by Third Party Plaintiffs will serve justice and assist the Court in the administration of the case. The changes proposed are not untimely as it was only after Third Party Plaintiffs began to effectuate service that they became aware of certain

³ Just like these governmental potentially responsible parties, the Plaintiffs cannot claim surprise or prejudice associated with the joinder of these additional third-parties in the proposed Amended Third Party Complaint as they received copies of the Notice of Intent to Sue as required by 42 U.S.C. § 6972(b)(2)(A).

scriveners' and other errors regarding the identification of certain named Third Party Defendants. Consequently, if the amendment sought by Third Party Plaintiffs is not permitted by the Court, these errors may create difficulties as the case progresses.

Plaintiffs and certain Third Party Defendants have filed motions with the Court seeking the dismissal of the Third Party Complaint. (*See* Dkt. Nos. 247, 564, 588, 591, 605, 612, and 732.) In their Responses, the Third Party Plaintiffs presented the Court with well-founded arguments and relevant authorities in support of their causes of action, but they also acknowledged that to the extent any of their asserted claims against the Third Party Defendants could be further clarified, they would be addressed in an Amended Third Party Complaint. (*See, e.g.*, Dkt. Nos. 495 and 749) Accordingly, the Amended Third Party Complaint serves justice and the administration of the case by clarifying the allegations against the Third Party Defendants, which will likely resolve the controversies placed at issue by the Motions to Dismiss.⁴

The ends of justice are also served by the filing of the Third Party Complaint as it permits the Third Party Defendants to exercise their right to a full and fair adjudication of the controversy initiated by Plaintiffs. As has been stated previously in filings with the Court, rather than address the complex environmental, social and economic issues at play in the 1,000,000 plus acre IRW through the statutory and regulatory mechanisms already in place in Oklahoma for the comprehensive management of watersheds, the Plaintiffs have chosen, for obvious political and economic reasons, to selectively attack only one sector of the agricultural and industrial economy in the region. The publicly-funded

⁴ *See Alston v. Parker*, 363 F.3d 229, 236 (3rd Cir. 2004) (holding that “[d]ismissal without leave to amend is justified only on the grounds of bad faith, undue delay, prejudice, or futility.”)

studies of the IRW are replete with references to the multitude of sources of nutrients and other constituents in the watershed, and key studies have concluded that zero progress can be made on the improvement of water quality unless these potential sources and management practices are addressed in a comprehensive and systematic fashion.⁵ Rather than follow the advice of their own regulatory agencies and state University, Plaintiffs, through their allegations of joint and several liability, seek to blame only the poultry industry for the alleged conditions within the IRW – conditions which have been affected by the entire spectrum of population, agriculture, industry, and naturally-occurring processes. Fed. R. Civ. P. 14 provides a mechanism for the Third Party Defendants to join into the lawsuit others who may be liable to them for the Plaintiffs' claims, and they should be afforded a full and fair opportunity to identify, join and prosecute their third-party claims in order to protect their interests, and to accomplish what the Plaintiffs refuse to do – address the dynamic, multi-faceted nature of this watershed environment to the fullest extent of the jurisdiction of this Court. Accordingly, allowing the Third Party Plaintiffs a reasonable period of time to investigate and identify significant potentially responsible parties and affording them a reasonable opportunity to amend their pleading to accommodate this discovery process preserves the Third Party Plaintiffs' rights and serves the needs of justice.

Finally, allowing Third Party Plaintiffs to file their Amended Third Party Complaint will not cause any prejudice to the parties or result in the waste of judicial

⁵ For example, see OKLAHOMA CONSERVATION COMMISSION, WATERSHED RESTORATION ACTION STRATEGY (WRAS) FOR THE ILLINOIS RIVER/BARON FORK WATERSHED (1999), attached as Ex. A to *Defendants' Response in Opposition to Plaintiffs' Motion to Sever and Stay and/or Strike or Dismiss the Claims Asserted in the Third-Party Complaints and Integrated Brief in Support*. (Dkt. No. 495.)

resources. At this time, no scheduling order has been entered by the Court so no deadlines will be affected by the amendment. Because Plaintiffs and all of the new Third Party Defendants identified in the proposed Amended Third Party Complaint received notice of their exposure and potential joinder into this lawsuit by virtue of receiving the Third Party Plaintiffs' Notices of Intent to Sue under RCRA, they cannot argue unfair surprise. *See Evans v. McDonald's Corporation*, 936 F.2d 1087, 1091 (10th Cir. 1991).

CONCLUSION

The Third Party Defendants have shown the Court that their proposed Amended Third Party Complaint is timely, will not prejudice the parties and will serve the interests of justice by aiding in the administration of the case and by allowing the Third Party Plaintiffs to pursue their rightful claims against other potentially responsible parties. Accordingly, the Third Party Defendants respectfully request the Court grant them leave to file their Amended Third Party Complaint in the form attached hereto as Ex. "A."

Respectfully submitted by and on behalf of:

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of June 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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